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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 474

H. GORDON HOWARD, *Petitioner,*

vs.

THE INTERNATIONAL TRUST COMPANY, Special Administrator of the Estate of Mary Steinhart, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, H. Gordon Howard, respectfully prays for a Writ of Certiorari directed to the Supreme Court of the State of Colorado to review a judgment of that Court affirming a judgment of the District Court in and for the City and County of Denver, Colorado, in a suit in equity for a constructive trust based on fraud brought by the respondent in the

courts of Colorado praying for the reconveyance of 30 acres of Illinois farm land, which deprived the petitioner and his family of their Constitutional rights of due process of law as guaranteed them by the 14th amendment to the U. S. Constitution.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported in 338 P. 2d 689 and is printed in Appendix A to this petition. The District Court in and for the City and County of Denver, Colorado, opinion is printed in Appendix B to this petition.

JURISDICTION

The date of the judgment of the Supreme Court of Colorado sought to be reviewed is April 27, 1959, entered on the same day. A petition for rehearing was denied by the Supreme Court of Colorado on May 18, 1959 (Appendix F) and the time within which to petition for certiorari was extended by this Court to October 15, 1959, by order signed by Mr. Justice Brennan on August 13, 1959.

The jurisdiction of the Supreme Court of the United States is invoked under Amendment XIV, Section 1 of the Constitution of the United States and Title 28 U. S. C. Section 1257.

I. THE QUESTIONS PRESENTED FOR REVIEW

1. Whether in a suit in equity brought in the State of Colorado by one of its citizens against another seeking equitable relief in the nature of a constructive trust in 30 acres of Illinois farm land, based on the alleged fraud of the defendant-grantee in obtaining the warranty deed from the plaintiff-grantor, can

the courts of Colorado compel the defendant-grantee, upon a finding of fraud, to reconvey the Illinois land back to the plaintiff-grantor where the record shows that the defendant-grantee held but the mere legal title to the disputed land, as trustee, for the benefit of two beneficiaries, one an infant, under a *intervivos* voluntary declaration of trust created and duly recorded in the land records of the State of Illinois prior to the trial, without first permitting the joinder of the trustee of the trust as a party defendant to the suit; and in so ordering the reconveyance did this violate the rights of the petitioner and his family to due process of law guaranteed them under the 14th Amendment to the U. S. Constitution?

2. Whether in a suit in equity, based on constructive trust charging fraud in the execution of a warranty deed of 30 acres of Illinois farm land, did the courts of the State of Colorado lose jurisdiction over the controversy by failing to permit the joinder of the trustee and two beneficiaries, one an infant, of a *intervivos* voluntary declaration of trust created in the disputed property by the defendant, duly recorded in the land records of the State of Illinois prior to the trial of the issue and service of process on the defendant, and by failing to appoint a *guardian ad litem* to protect the interests of the known infant beneficiary to the trust, and thus deprive the parties of their property without due process of law in violation of their rights guaranteed by the 14th Amendment to the U. S. Constitution, when the Court ordered the defendant, as an individual, to reconvey the Illinois land to the plaintiff grantor?

II. CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The case involves Section 1. of Amendment XIV, United States Constitution:

U. S. C. A. Const. "Amend. 14 Section 1.—All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. CONCISE STATEMENT OF THE CASE

The respondent, Mary Steinhart, a widow of eighty-eight years of age, brought an action in equity before the District Court in and for the City and County of Denver, Colorado, asking the court to compel the petitioner, H. Gordon Howard, a practicing attorney before the courts of the State of Colorado and a part-time real-estate broker, to reconvey 30 acres of Illinois farm land to her which she claimed was fraudulently procured from her by the petitioner.

The petitioner answered the complaint, denied the allegations and countersued the respondent for rescission based on alleged fraudulent misrepresentations made by the latter in that she had a fee simple estate when she conveyed the property to him by warranty deed, but in her complaint alleges that she only had a life estate.

Prior to the date of the trial, petitioner made no formal motion to join either his wife, Gladys Iola

Howard, his son, Timothy Gordon Howard, or himself, as trustee for these said individuals, but on the day of the trial, and before it started, advised the court that he held the title to the disputed Illinois farm land as trustee for the benefit of Gladys Iola Howard and Timothy Gordon Howard, an infant, and that an *intervivos* voluntary declaration of trust had been created some nine months earlier, and before service of process on him; and that the trust had been duly recorded in the land records of the State of Illinois. The petitioner then sought to have the court act accordingly to protect the rights of these real parties in interest. The court in spite of the admonishment by the petitioner that the rights of beneficiaries to a valid trust were involved in the suit, and particularly those of an infant, proceeded to decide the case with only the petitioner as an individual defendant, but in no other capacity. Printed in Appendix C of this petition is the official court reporter's transcript (R. 174-177) of the argument between court and counsel on the aforesaid request to join the additional persons to the suit and the denial of the request by the trial court. Yet, this same trial court received into evidence the voluntary declaration of trust upon tender by the respondent. (Plaintiff's Exhibit "O"; printed in Appendix D of this petition.)

It is at this stage of the controversy and in the court of first instance, the trial court, that the basic constitutional question arose and the grounds formulated for the requested Writ of Certiorari, *i.e.*, the failure of the trial court to take any affirmative action in protecting the rights of the known beneficiaries to the trust and in particular the rights of the infant herein involved.

Subsequent to the trial in the court of the first instance, but before appeal to the Colorado State Supreme Court, the respondent Mary Steinhart died and the International Trust Company, as special administrator for the estate of Mary Steinhart, became the party plaintiff. For the purpose of this application and the Writ of Certiorari, respondent will be referred to as Mary Steinhart.

The trial court ruled in favor of the respondent finding that the petitioner fraudulently procured the signature of the respondent on the warranty deed and the purchase money receipt for the $6,000.00 consideration alleged to be paid over to her and ordered the petitioner to reconvey the Illinois farm land to the respondent. (See Appendix B of this petition.)

Petitioner made a motion to vacate the judgment of the trial court for lack of jurisdiction over the controversy on the failure of the court to permit the joinder of the trustee, on behalf of the beneficiaries of the trust, as a party defendant, among other grounds; stating all of which denied him due process of law under the 14th Amendment to the U. S. Constitution (R. 104-115). He followed this by a motion for a new trial based on the discovery of new evidence (R. 124-160). The trial court denied the motion to vacate for lack of jurisdiction and the motion for new trial based on newly discovered evidence (R. 118). Petitioner made a second and further motion for a new trial with supporting affidavits and exhibits indicating that the respondent did not have a mere life estate in the Illinois property, but a fee simple estate and had conveyed the latter interest by will after death. This motion was likewise denied (R. 165).

Petitioner appealed to the Supreme Court of the State of Colorado from the adverse decisions of the District Court in and for the City and County of Denver, Colorado, assigning sixteen grounds of error (Pages 15-34 of petitioner's brief on appeal, R. 466). The majority of the assignments of error relate to the trial court abusing its discretion in the matter of the evidence and the consequential violation of petitioner's right to due process of law under the 14th Amendment to the U. S. Constitution. The summary of grounds 1. and 16. in the petitioner's brief are set forth here verbatim to illustrate directly the constitutional grounds argued in the appellate court:

> "GROUND 1. The trial Court abused its discretion in refusing to join Gladys Iola Howard, a beneficiary, and Timothy Gordon Howard, a five (5) year old child beneficiary, named in plaintiff's Exhibit O, folio 1198, in the action to protect their interest, and by so abusing its discretion the court lacked jurisdiction to proceed with the trial, and the Court should have therefore granted defendant's motion to vacate the judgment for lack of jurisdiction (folios 171 thru 190).
>
> GROUND 16. The trial court, abused its discretion in depriving Timothy Gordon Howard, a five-year old baby under a trust, and the other beneficiary under the recorded conveyance in trust, Gladys Iola Howard, of their land and the entire beneficial interest in the land belonged to her and little Timothy under the recorded conveyance in trust, plaintiff's Exhibit O, folio 1198, admitted folio 457."

The Supreme Court of the State of Colorado affirmed the decision of the District Court in and for the City and County of Denver, Colorado (Appendix A).

Petitioner filed a petition for rehearing of the appellate decision setting forth eight points which he contended the Supreme Court of Colorado over-looked in affirming the lower court and which constituted a denial of due process of law to the petitioner and his family as guaranteed them under Section 1, Amendment 14 of the U. S. Constitution (See Appendix E). The petition for rehearing before the Supreme Court of the State of Colorado was denied on May 18, 1959 (Appendix F).

Petitioner filed a motion for stay of proceedings after entry of judgment in the Supreme Court of the State of Colorado pending perfection of an appeal to the Supreme Court of the United States, which was denied June 4, 1959 (R. 498).

IV. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decision of the Supreme Court of the State of Colorado ignores the rights of the petitioner and his family to the fundamental "law of the land" in the equity suit below which is tantamount to depriving them of their rights guaranteed under the 14th Amendment of the U. S. Constitution.

2. The Supreme Court of the State of Colorado failed to apply well recognized principles of equity, the "law of the land," to the issues of this case or even to consider the law. Petitioner contends that the lower court's decision is directly contrary to applicable decisions on what the fundamental principles of equity are in deciding the determination of property rights of those persons who are not before the court, and in particular the rights of infants, decided both by this Court and by courts of all the jurisdictions in the United States, as hereinafter specified.

3. Because of the nature of the issues and because of the failure of the District Court in and for the City and County of Denver and the Supreme Court of the State of Colorado to consider the well recognized principles of equity, the fundamental "law of the land," in depriving the petitioner and his family of their property without due process of law, which is directly involved herein, this case involves an important question of constitutional law which has been established, but not followed by the referred to courts, and which should be passed on by this Court to prevent serious damaging effect on the fundamental "law of the land" as recognized by this Court heretofore.

The basic error of the decisions of the District Court in and for the City and County of Denver, Colorado, and the Supreme Court of the State of Colorado is that they completely ignore the function and nature of a court of equity in determining the rights of parties to property who are not before the court and the rights of parties who have an interest in the disputed property to appear before them to have their "day in court."

It was the intent and purpose of the decisions of this Court rendered thus far in determining the fundamental "law of the land," as hereinafter specified, to prevent further decisions like those of the courts below in this case, by providing standards in the administration of justice in courts of equity and protection from arbitrary and capricious disposition of the rights of litigants appearing, or attempting to appear, before equity tribunals. Here the petitioner already a party to the equity suit filed by the respondent who was seeking to compel the re-conveyance of 30 acres of Illinois farm land to her by the petitioner,

H. Gordon Howard, on the equity principle of constructive trust based on alleged fraud in the execution of her warranty deed of the property to petitioner Howard, prayed the courts below to permit the joinder of himself, as trustee for the benefit of and to protect the rights of two beneficiaries, one an infant, under a trust created and recorded in the land records of the State of Illinois nine months prior to the trial of the issue, the existence of the trust a matter of record; nevertheless, the courts below refused such a prayer.

V. ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The Decisions of the Courts Below Concluded the Rights of the Beneficiaries to the Trust in the Disputed Property Although They Were Not Made Parties to the Action and Thus Deprived Them of Their Property Without Due Process of Law

Although, formally, the action below is labeled in *personam* and directed against the petitioner, H. Gordon Howard, the object of the suit was to obtain the return of the Illinois farm land. This was achieved when the courts below directed the reconveyance of the land to the respondent and thus concluded the rights of the beneficiaries of the trust, Gladys Iola Howard and Timothy Gordon Howard, wife and infant child of the petitioner, without their appearance in court as parties to the suit.

The trial court in refusing to permit the joinder of the trustee, of the then known trust on the day of the trial, concluded that it was too late and not proper to make an oral motion for intervention and that the petitioner had failed to comply with Rule 24(c) of the Colorado Rules of Civil Procedure which provide for intervention by a motion served on the other party

accompanied by a pleading setting forth the claim or defense for which the intervention was sought (See Appendix C of this petition).

The court below, desirious of concluding the case that day, refused to continue the matter for a day or two to permit the pleadings to conform to the equities of the suit (Appendix C).

It is well recognized that equity courts have the inherent power to render full and complete justice, under the well recognized principles of equity, in spite of a mere technicality which temporarily precludes the rendition of true justice.

It is submitted that the trial court did not have jurisdiction to try the case, as it did, on the pleadings as they were. The courts of the State of Colorado have sustantially adopted the Rules of Civil Procedure of The Federal Courts, 28 USCA, and this Rule 19(c) (also 19(c) of the FRCP) provides as follows:

> "In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined and shall state why they are omitted."

In view of Rule 19(c) of the Colorado Rules of Civil Procedure, it was more imperative for the equity court below to demand that the pleadings were in order and that all the parties who should be before it, were being properly represented in the matter—especially so when it had been informed that there were other parties involved and that the pleadings were not in order (Appendix C).

The District Court in and for the City and County of Denver, Colorado, received into evidence, after proffer by the respondent, the Voluntary Declaration of Trust (R. 229-230) made by the petitioner some nine months before trial and before service of process of the suit on him. The court, though not specifically making a finding as to the validity of the trust, by its very action in ordering a reconveyance of the land by the petitioner, who was also the trustee of the disputed property for the beneficiaries, determined the validity of the trust and concluded the rights of Gladys Iola Howard and Timothy Gordon Howard, an infant, who were not parties to the suit.

The Supreme Court of Colorado in answer to petitioner's assignment of error that the District Court in and for the City and County of Denver, in ordering him to reconvey the Illinois land failed to join the beneficiaries of the trust as parties and give them their "day in court" dispensed with this by stating, among other things, in its opinion: (Appendix A)

> "... It may be noted in passing that if the plaintiff's interest in the Illinois farm was a life estate only, as appears to be the case, then whatever interest the defendant acquired by deed in controversy, or which was transmitted to the beneficiaries by his declaration of trust, terminated upon the death of plaintiff." (*The respondent plaintiff died subsequent to the trial of the issue, but before appeal to the Colorado Supreme Court.*)

It is readily apparent that this reasoning by the Supreme Court of Colorado ignores the fact that there was a real property interest, be it only a life estate, which was passed by the trust and that this property interest existed at the time of and during the trial, and was adjudicated upon by the District Court in

and for the County of Denver, Colorado, without the owners before it.

B. The Fundamental "Law of the Land" Is That No Person Can Be Deprived of Property Rights by Any Decree in a Case Wherein He Is Not a Party

The decision of the courts below concluded the property rights of the beneficiaries of the trust without due process of law and violated their rights under Section 1, Amendment XIV of the U. S. Constitution. It is fundamental that no person can be deprived of property rights by any decree in a case wherein he is not a party. *Iron Cliffs Co.* v. *Negaunee Iron Co.* (1904), 197 U. S. 463, 25 S. Ct. 474, 49 L. Ed. 836, citing *Finley* vs. *United States Bank*, 24 U. S. 304, 11 Wheat 304, 307, 6 L. Ed. 480, *New Orleans Water Works* vs. *New Orleans*, 164 U. S. 471, 480. To do so, as petitioner contends was done in the instant case, constitutes taking property without due process of law. The decree was invalid because it concluded the rights of persons who were absent when the disposition of their rights were determined. A court of equity can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. *Gregory* vs. *Stetson* (1890) 133 U. S. 579, 10 S. Ct. 422, 33 L. Ed. 792, citing *Shields* vs. *Barrow* (1854) 17 Howard 130, 58 U. S. 130, 15 L. Ed. 158.

The fundamental equity law which the courts below ignored; and that which petitioner contends is the "law of the land" denied in this case, is aptly stated in *Gregory* vs. *Stetson, supra*, at Page 586 of the opinion by Justice Lamar when he stated who shall be made parties to a suit of equity, quoting Story's Equity Pleadings, Section 72:

"It is a general rule in equity (subject to certain exceptions, which will hereafter be noticed) that all persons materially interested, either legally or beneficially, in the subject matter of a suit are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others, who are interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto."

This is still the law as it exists today and which is and should be applied in equity suits of the kind below. (Subchapter B. Necessary Or Indispensable Parties., Section 142 of Statement of Rule in the Chapter on Equity, 30 C.J.S. Pages 573-575). A review of the exceptions indicated in the above passage of the fundamental "law of the land" have no application to the facts of the case below because it is obvious that the parties precluded from making their appearance in the court below had real substantial interests in the litigation.

C. The Decision of the Supreme Court of Colorado Conflicts With the Following Cases Holding a Court of Equity Is Duty Bound to Protect the Interests of All Persons, in Particular That of Infants, Who Have an Interest in the Disputed Property and Especially Where Their Interest Is Brought to the Attention of the Court

O'Hara, et al v. *MacConnell*, 1876, 93 U. S. 150, 23 L. Ed. 840, places a duty on the court in equity suits, of the same nature as the case below, to appoint a guardian *ad litem* to protect the interest of the minor where the bill on its face showed that the party whose interest was the primary one to be affected by the decree. In the case at bar the court was apprised of the interest of the minor child and his mother, first by the petitioner prior to the start of the trial (Appendix C), and then again when the trust was offered into evidence by the respondent during the trial (R. 229-230).

The Court in *O'Hara, et al* vs. *MacConnell, supra*, at page 152, by Justice Miller stated as follows:

> "1. It was the duty of the court, where the bill on its face showed that the party whose interest was the principal one to be affected by the decree was both a minor and a *feme covert*, and that no one appeared for her in any manner to protect her interest, to have appointed a guardian *ad litem* for that purpose. If neither her husband nor he who is styled her guardian in the bill appeared to defend her interest, it was more the imperative that the court should have appointed some one to do it. There is no evidence in the record, except the statement in the bill, that Dr. Barr was her guardian. If he was not, then there was no one served with notice, whose legal duty it was to defend her. If he was her guardian, there is no evidence of the precise nature of his duties or power, as there are several classes of

guardians. As to the particular property now in contest, *she had a trustee, in whom the title was vested for her use, and whose duty it would have been to protect her interest in it; but, strangely enough he was not made a party.* It was therefore error in the court to proceed to a decree without appointing a guardian *ad litem.*" (Emphasis added).

And the same court further at page 154:

> "*How the decree can clear the property of this trust without having the trustee before the court it is difficult to see.* This was *the object of the suit;* but how can it be made effectual for that purpose in the absence of the person in whom the title is vested? We think that, in a case like this, where a woman, under the double disability of coverture and infancy, has a trustee in whom the title of the property in controversy is vested for her use, *the court should have refused a decree until he was made a party.*" (Emphasis added.)

To cover-up the error of the District Court in and for the City and County of Denver, Colorado, in this regard, the Supreme Court of the State of Colorado relied upon the death of the respondent as a way of clearing the disputed property of the trust, but this falacious reasoning would only be appropos had respondent Mary Steinhart died before the trial and before the trial court decided the disposition of the property.

Another case placing a duty on the equity court to protect the interests of infants before determining their property rights is *Galpin* vs. *Page*, 1874, 9 Fed. Cases, page 1126, 3 Sawy. 93. A host of others can be enumerated but all to the same point that a duty

lies with the court to protect the rights of the infants in propery and not with the participants or attorneys before its tribunal.

D. The Decisions of the Courts Below Are in Conflict With the Fundamental "Law of the Land" Which Affords Every Citizen the Right to a Day in Court, and an Opportunity to a Hearing Before Being Divested of Property Rights

Words *"Law Of The Land"* and *"Due Process Of Law"* when used in considering individual property rights, *means* summons or notice ordinarily given at institution of suit, *due appearance of parties in interest,* pleading of facts to issue, and determination thereof by jury; (*State* vs. *Rose,* 132 A.864, 33 Del. 168, 45 ALR 85) that by appropriate procedure duly prescribed, fair notice *and reasonable opportunity to be heard be given to interested parties before judgment is rendered;* (*City of Coral Gables* vs. *Certain Lands Upon Which Taxes Are Delinquent,* 149 So. 36, 110 Fla. 189.) *a guarantee that every man have his day in court and benefit of general law.* (*City of Chicago* vs. *Cohn,* 158 N.E. 118, 326 Ill. 372, 55 ALR 196).

All parties interested in the controversy affecting their property rights are entitled to a hearing, (*In Re Water Rights of Utah Const. Co.,* 30 F (2d) 436) and the courts should be open to all persons desiring to have personal and property rights adjudicated (*McCullough* vs. *Cuthbert,* 267 P.828, 46 Idaho 294) no matter how meritorious plaintiff's cause of action may be, defendant is entitled to his day in court thereon (*Watson Co., Builders* vs. *Bleeker,* 285 S. W. 637).

VI. CONCLUSION

Certainly, the fundamental principles of equity, as are applicable to all the equity courts of the United States under the decisions of this Court and other courts in all jurisdictions, demand that a court of equity grant complete and full relief to all the parties, either before it or those who have an interest in the subject-matter at issue and request to be heard, and preclude the rendition of decisions, such as the one by the court below, which acted arbitrarily, capriciously and made a mockery of the fundamental "law of the land".

The only conclusion petitioner can draw from the facts of record in this case is that the District Court in and for the City and County of Denver, Colorado, and the Supreme Court of the State of Colorado deprived the petitioner and his family of their property without due process of law in direct violation of their rights guaranteed them by Section 1, Amendment XIV, of the United States Constitution, when they compelled the petitioner to reconvey the 30 acres of Illinois farm land to respondent without permitting the joinder of the real parties in interest, the beneficiaries to the then existing active trust.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 18346

H. GORDON HOWARD, *Plaintiff in Error*

v.

THE INTERNATIONAL TRUST COMPANY, Special Administrator of the Estate of Mary Steinhart, Deceased, *Defendant in Error*

Error to the District Court of the City and County of Denver
HONORABLE H. JOE RAWLINSON, *Judge*

(April 27, 1959)

Mr. H. Gordon Howard, Pro Se; Messrs. Holland and Hart, Mr. William C. McClearn, Mr. Philip A. Danielson, Attorneys for Defendant in Error.

Mr. Chief Justice Knauss delivered the opinion of the Court: Plaintiff in error H. Gordon Howard was defendant in the trial court and Mary Steinhart was plaintiff in an action to compel a reconveyance of property located in the State of Illinois. Judgment was for the plaintiff and the defendant is here by writ of error seeking reversal. Subsequent to the trial of the case below, the plaintiff Mary Steinhart died and the International Trust Company, as her personal representative, was substituted as plaintiff and appears as defendant in error in this court. We will

refer to the parties as they appeared in the trial court, or by name.

It is alleged in the complaint that the defendant Howard, while employed by plaintiff as a real estate agent to sell her Denver residence property, fraudulently and without her knowledge, induced her to execute a general warranty deed conveying to Howard a parcel of farm land in LaSalle County, Illinois, in which she owned a life estate. She prayed for an order requiring Howard to reconvey the Illinois property to her and for other relief. Defendant, by answer, denied the allegation of the complaint and by counterclaim alleged that plaintiff had fraudulently represented that she owned the fee title to the Illinois land and that in relying upon such representation he had purchased the same from her for a consideration of $6000.00 paid to her in cash. He prays for a recission of the transaction and return of the money allegedly paid and for other relief.

A chronology of events leading to the filing of this action appears from the record briefly as follows: The plaintiff, Mary Steinhart, a widow of eighty-eight years of age with failing eyesight, on March 28, 1956, was the owner of a property at 841 Adams Street in Denver, which she had occupied as a residence for many years. At that time she was also the beneficiary of a life estate in 30 acres of farm land in LaSalle County, Illinois, which had been devised to her by the will of her father, with the remainder to two half-sisters. The defendant Howard at the times mentioned was a licensed real estate broker, as well as a licensed attorney at law, with offices at 1336 East Colfax in Denver. On the date mentioned Mrs. Steinhart (whether at her request or upon defendant's solicitation is in dispute) executed an exclusive agency agreement with Howard for the sale of the residence property at 841 Adams Street. On the same day a contract for the sale of the property was entered into by Howard on behalf of Mrs. Steinhart with third parties. This contract resulted in sale of the property, the transaction being concluded on May 23, 1956. While this

matter was pending Howard had occasion to contact Mrs. Steinhart several times. One such occasion being a few days after the contract for the sale of the residence property had been entered into, when he called for her at her home and drove her to the Burns Vault Building, where she maintained a deposit box, for the purpose of obtaining the abstract of title to the Adams Street property. While returning from this errand the defendant inquired whether she had any income property, to which she replied that she had an interest in some farm land near the town of Ransom, Illinois. She asserted that nothing more was said concerning the farm property. Howard's testimony is that she told him she owned a farm in Illinois consisting of 160 acres, and that she was anxious to sell it and asked him to make an offer for it. In any event, while returning to her home they stopped at his office on East Colfax Avenue. He entered the office while she remained in the car; after about fifteen minutes he returned and they continued on to her home at 841 Adams Street. Upon arrival there he produced some papers which he said required her signature in connection with the sale of the residence property. She testified that she was unable to read them but trusted Mr. Howard and affixed her signature to such papers as he directed.

On April 17, 1956 the plaintiff vacated her residence at 841 Adams Street and moved to an apartment at 32 Washington Street. On May 24, 1956 a warranty deed, dated and acknowledged May 8, 1956, conveying the Illinois farm property from plaintiff to defendant, was recorded in the office of the Registrar of Deeds of LaSalle County, Illinois. The signature to this deed and to a receipt acknowledging payment of the sum of $6,000 in cash as consideration for the conveyance, are acknowledged to be genuine signatures of the plaintiff. Aside from the deed and the receipt mentioned, no other record of the transaction was made or kept by the defendant, although, as he

testified, he had been a licensed real estate broker and lawyer for many years.

It was shown that it was customary for the plaintiff to write her correct address on all checks or letters signed by her, and it appears that prior to April 17, 1956 she wrote her address on all such documents as 841 Adams Street, and thereafter as 32 Washington Street. The receipt which it is claimed the plaintiff signed in connection with the sale of the farm property, acknowledging receipt of $6,000, is dated May 8, 1956, at which time she was residing at 32 Washington Street. However, the address noted on the receipt in her handwriting is "841 Adams Street," followed by her telephone number at that address. Howard testified that when the receipt was signed he requested her to also write her address and telephone number thereon. A friend of fifty years testified that she had never known Mrs. Steinhart to write a wrong address on a check or letter. It appears clear that Mrs. Steinhart either departed from her long-standing custom and habit in this single instance by writing an incorrect address and telephone number on the receipt in question, or that the document was signed at some time prior to April 17th. In early June she wrote a letter to the tenant who operated the farm enclosing a check for the purchase of seed and other farm expenses. On July 2nd after the bona fides of the transaction had been questioned by plaintiff's counsel, the defendant wrote a letter to "Albert Keetz," tenant on the Illinois farm, whose correct name is "Kates," inquiring as to plaintiff's title and stating that if it consisted only of a life estate, he had been given a "gypping." On August 6, 1956 defendant was served with summons and complaint in this action, and on the same day executed what is titled "Voluntary Declaration of Trust" in which he declares that he holds title to the Illinois farm property as trustee in trust for the benefit of his wife, Gladys Iola Howard, and his minor son.

Mrs. Steinhart testified that she had never knowingly signed the warranty deed or the receipt, and that she had never been in defendant's office; that she did not know the legal description of the Illinois property and had not communicated it to defendant; that she had never offered to sell the property to defendant and had not done so, and had never received $6,000 or any other sum of money from him.

Defendant testified that plaintiff importuned him on several occasions to purchase the Illinois property, representing to him that she was the fee owner and that the farm consisted of 160 acres. That in late March or early April he wrote to brokers and an abstract company in LaSalle County requesting information as to the character and value of property in that county owned by plaintiff. Two of these parties responded advising him that a farm property consisting of thirty acres was assessed to Mrs. Steinhart in that county and that its assessed value was $5,900. Upon receipt of this information defendant concluded that Mrs. Steinhart was a "crook and trying to defraud me," and forthwith destroyed all of the correspondence with the brokers and abstract company relating to the character and title of the land, including copies of his letters of inquiry. He was unable to recall the contents of the letters or to remember the names of the firms with which he had corresponded, stating that after he found out that she was a "crook" he wanted nothing more to do with the matter; threw the letters away and wanted to forget it. However, notwithstanding his vigorously expressed opinion of the plaintiff's low moral character and his complete ignorance of the character or extent of her title, and without observing the normal precautions invariably taken by a lawyer to avoid buying a "pig in a poke" when dealing in his own interest, he succumbed to her importunities and overnight agreed to buy the farm and pay her $6,000 in cash therefor in compliance with her demand for the money

in cash, that she might keep knowledge thereof from her attorneys and avoid the payment of income taxes on the transaction. The agreement to buy the farm, according to defendant, was reached on May 7th in response to a telephone call from Mrs. Steinhart, and concluded the next morning, May 8th, at which time she came to his office where the deed was prepared, the receipt signed and the money ($6,000 in cash) which he obtained from a trunk in a closet in the bathroom of his home, paid over to her. Defendant produced a witness who testified to being present at the time the receipt was executed and the money paid over, and who accompanied defendant and Mrs. Steinhart to a notary's office where the deed was signed and acknowledged. Both the notary and her employer testified that on the day in question the defendant, with an elderly lady whom they identified as the plaintiff, and another man, came to the office where the deed in question was signed and acknowledged by the lady.

By the testimony of an expert in the field of questioned documents, it was shown that the receipt for $6,000, admittedly signed by the plaintiff, was not typed in its entirety at one insertion in the typewriter. The words "Seller" followed by a line for signature, and "Address of Seller" followed by a similar line was typed at one insertion and the body of the instrument at another. His testimony was illustrated by exhibits consisting of enlarged reproductions of the receipt showing that the vertical alignment of the letters in the body of the instrument do not correspond with the letters in the "Seller" and "Address of Seller" lines. This, according to the expert, shows that the receipt was not typed in its entirety at one insertion in the machine, but that the body thereof was typed at one time and the "Seller" and "Address of Seller" lines at another. Defendant at first testified that the entire receipt had been written at one time, but upon being confronted with the testimony of the expert, stated that he had taken

the receipt out of the typewriter three or four times to consult with Mrs. Steinhart respecting its contents.

Trial was to the court resulting in findings and judgment for plaintiff. Motion for a new trial was dispensed with. Notwithstanding which the defendant filed two such motions, as well as a motion to vacate the judgment; all of which were overruled.

Based upon the evidence we have outlined, the trial court in its findings made the following observation:

> "All of these facts can lead the Court only to the conclusion that defendant at the time he handled the sale of the Adams Street property for this plaintiff, knowing the plaintiff could not see, inserted a blank deed which the plaintiff signed, and inserted a blank piece of paper which was later typed up as a receipt, which the plaintiff also unknowingly signed, and then recorded the deed in the State of Illinois in attempting to gain control of plaintiff's property."

Sixteen grounds of error are assigned, which may be reduced to four main contentions: 1. That the evidence does not support the judgment. 2. That necessary parties were not brought into the action. 3. The court abused its discretion in overruling defendant's second motion for a new trial on the ground of newly discovered evidence. 4. The admission of incompetent and irrelevant evidence.

1. The first and fourth grounds may be considered together. The evidence, as will be observed, was in irreconcilable conflict, and from the quoted remarks of the trial court it is apparent that the testimony of the defendant and that of his witnesses was rejected. Unless we can say that the findings and conclusions of the trial court are so manifestly against the weight of the evidence as to compel a contrary determination, they are binding upon this court.

It was the duty of the trial court to resolve the conflicting contentions of the parties and to determine where the truth lay. That the trial judge chose to credit the testimony of

the plaintiff as against that of the defendant, indicates that he was not impressed with the demeanor or convinced of the veracity of the defendant or of his witnesses as they appeared before him at the trial. That defendant's explanation of the manner in which the negotiations for the purchase of the farm land were initiated and carried out was a severe strain upon the credulity of the trial judge, cannot be doubted. That a lawyer and real estate broker of many years experience, while under employment as agent for the sale of residence property, would undertake to deal with an eighty-eight year old partially blind widow to his own advantage in respect to other property owned by her, admittedly worth double the amount allegedly paid, and, contrary to all approved business practices paid the money to her, not by bank draft or check, but in currency, and with funds not withdrawn from a bank account and susceptible of proof, but obtained from a secret hoard kept by him in a trunk in the closet of his bathroom, is a serious challenge to the receptive processes of a reasonable mind. No effort was made to trace this large sum of cash into the assets of the plaintiff to determine whether she deposited it in a bank account or otherwise disposed of it.

> "It is, therefore, a question for the trial court as to the convincing effect of the evidence. . . . It is that court, not this, which must determine the credibility of the witnesses, pass upon the weight of the evidence and find the facts." *Davis* v. *Pursel*, 55 Colo. 287, 134 Pac. 197.

We conclude that the plaintiff's evidence, and the legitimate inferences to be drawn therefrom, was ample to sustain the findings and judgment of the trial court.

As to the numerous objections to the admission of evidence as incompetent, immaterial or hearsay, it need only be said that where, as here, trial is to the court, the presumption prevails that all immaterial, incompetent or hearsay evidence was disregarded by the court in reaching

its conclusions, and a judgment will not be reversed because of the admission of such evidence. *Vanadium Corp.* v. *Wesco Stores*, 135 Colo. 77, 308 P. (2d) 1011.

2. It is contended by defendant that the court erred in not requiring his wife, Gladys Iola Howard, and his infant son to be made parties to the action. The basis of this contention is that on August 6, 1956, by coincidence it being the same day upon which defendant was served with process in this action, he executed the voluntary declaration of trust before referred to. Although defendant asserts that he is counsel for these parties, he made no effort during the months the matter was pending before trial to have them made parties or intervene in the action, or otherwise assert any claimed rights. Some discussion was had on the day the trial began as to whether these parties should be brought into the case, and both the court and plaintiff's counsel indicated agreement provided the trial would not be delayed. The trial court called defendant's attention to the requirements of the Rules of Civil Procedure relating to intervention, and no further point was made of the matter.

The action being in personam directed only to Howard, and no relief of any kind being asserted or sought against the beneficiaries of the alleged trust or any other persons who might have or claim an interest in the Illinois property, no determination of their rights is or could be had in this action. In addition the claim is wholly inconsistent with the position taken by defendant in his answer and counterclaim, filed months after the execution of the alleged trust, wherein he seeks rescission of the transaction on the ground of fraud, and a return of the consideration allegedly paid. No mention is made therein of the interest of any other person in the controversy. It was not error, under the circumstances to decline to entertain an informal motion, made on the day of the trial, to make these parties defendants in the action. It may be noted in passing that if

the plaintiff's interest in the Illinois farm was a life estate only, as appears to be the case, then whatever interest the defendant acquired by the deed in controversy, or which was transmitted to the beneficiaries by his declaration of trust, terminated upon the death of the plaintiff.

3. Error is assigned to the overruling of defendant's motion for a new trial. The first of these was based upon alleged newly discovered evidence, and is supported by the affidavits of Howard and of a Mrs. Montoya who claimed to have been present in Howard's office at the time Mrs. Steinhart executed the receipt for $6,000 and received the money. She did not contact defendant before or during the trial, asserting that she had no knowledge of the pending litigation until reading of it in the newspapers. The testimony of this witness, had it been available at the trial, would have been cumulative only, her affidavit reciting facts identical in most particulars with the testimony of Howard and other witnesses, would increase by one the number of witnesses who claimed to be eye witnesses to one phase or another of the transaction of May 8, 1956, and while adding to the aggregate weight of the witnesses, would add nothing to the weight of the evidence. The second motion was grounded on the provisions of Mrs. Steinhart's last will and a codicil thereto, probated following her death, which it is said refutes her testimony given at the trial that her interest in the Illinois property was only a life estate. An examination of the exhibits attached to this motion convinces us that there is no merit in this contention. The granting or denial of a motion for a new trial on the ground of newly discovered evidence rests largely in the sound discretion of the trial court, and in the absence of an abuse of that discretion will not be disturbed. *Walsmith* v. *Hudson*, 77 Colo. 326, 236 Pac. 783.

The trial court, presiding at the trial with admirable patience and fortitude, saw and heard the witnesses on both sides of the controversy, observed their manner and

demeanor on the witness stand, and resolved the conflicts in the evidence favorable to the plaintiff. There being sufficient competent evidence to support the findings, the judgment must be and is affirmed. Mr. Justice Sutton and Mr. Justice Doyle not participating.

APPENDIX B

Filed in District Court, City and County of Denver

May 9, 1957

David W. Oyler, Clerk

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

MARY STEINHART, *Plaintiff*,

v.

H. GORDON HOWARD, *Defendant*.

Findings and Judgment

This is an action by the plaintiff, Mary G. Steinhart, wherein she seeks to set aside a deed purporting to convey certain farm property in the State of Illinois. The basis of plaintiff's complaint is that a fraud was perpetuated upon her by the defendant in securing said deed conveying the property. The defendant denies any fraud was perpetrated upon the plaintiff and cross-claims against the plaintiff stating that fraud was perpetrated against him in that the plaintiff transferred to him for adequate consideration in fee simple the Illinois property, whereas, in reality the plaintiff had only a life estate in said property.

The testimony and evidence presented at the trial shows that on March 28, 1956, the plaintiff retained the defendant as a licensed real estate broker to negotiate the sale of her house at 841 Adams Street in Denver; that on this date what is commonly known as a "listing contract" was signed

by the plaintiff and by the defendant, doing business as Denco Realty Company. (Plaintiff's Exhibit A). A deed (Plaintiff's Exhibit B) also dated March 28, 1956, shows the transfer and sale of the Adams Street property to a third party and is signed by the defendant as agent of the seller, who in this case is the plaintiff.

The testimony of the defendant is that during the negotiation with the plaintiff regarding the sale of the Adams Street property, the plaintiff broached the subject to him of disposing of the property now in question before this Court, namely, the farm in Illinois. According to the defendant's testimony, the plaintiff told him that she owned a 160 acre farm in Illinois and that she would "make him a good price on the farm." The defendant went on to testify that although he was not particularly interested in acquiring any farm property at that moment, he did have a general interest in farm lands, so he wrote to Illinois to two firms of real estate brokers to make inquiry regarding the value of the land. Reply was made to this inquiry that the land was valued at $400.00 to $600.00 per acre and was described as good land. It was also brought to the attention of the defendant that the plaintiff had only 30 acres assessed to her with an assessed valuation of $5,900.00. Defendant says his reaction, upon learning that the plaintiff had only 30 acres assessed to her, was that he became disgusted with the plaintiff because in his opinion she had lied and was trying to defraud him and "I knew she was a crook." Therefore, the defendant says he destroyed all the correspondence which he received from the Illinois brokers regarding this land and tried to forget the whole incident. Nevertheless, according to this defendant, the plaintiff telephoned him on May 7, 1956, and again wanted to know if he would buy the Illinois farm. Defendant testifies that he told the plaintiff at that time she did not own 160 acres; that the plaintiff admitted she owned 30 acres and asked if defendant would buy the 30 acres. Defendant then says he agreed, during this 'phone call, to buy the 30 acres for

$6,000.00 cash; that the land was worth more and that he told the plaintiff it was worth more. That on May 8, 1956, at about ten o'clock a.m., the plaintiff came by taxicab to the defendant's real estate office and that at this time he paid the plaintiff $6,000.00 in cash for the 30 acres of land in question and obtained a receipt (Plaintiff's Exhibit M) bearing the signature of the plaintiff as the seller and the signature of one Oakley Mike Dearing as a witness. That the money was paid in currency in the denominations of $100.00 bills, $50.00 bills and $10.00 bills which the defendant stated he got from his trunk which he kept in his bathroom closet; that he had kept large amounts of cash in this trunk for several years and that he, the defendant, was the only person who knew the money was there. In addition to the sale of the land, the receipt, Plaintiff's Exhibit M provides that the purchaser will have the 1956 crop. The defendant then testifies that a warranty deed to the property was made out by him in his office and was taken to a notary where the plaintiff, in the presence of the notary signed the deed. The defendant further testified that it was the desire of the plaintiff to keep this entire transaction secret from her attorneys and from her daughter.

It is important to note at this time that the defendant testified emphatically that the receipt, Plaintiff's Exhibit M, was typed in its entirety in the presence of the plaintiff, as was the warranty deed. Although it is admitted that the plaintiff in this case was a woman of 88 years and that, according to the testimony of the defendant, it was necessary for her to read with the aid of her glasses plus a magnifying glass, that in his opinion the plaintiff was fully alert and competent.

The plaintiff, on the other hand, testifies that she at no time discussed selling the Illinois farm with this defendant or anyone else; that she did not receive the $6,000.00 from the defendant; that she was never in his office on May 8th or any other date; that all she knows of this transaction is that during the negotiations for the sale of the Adams

Street property the defendant read to her certain papers and that she signed numerous papers; that after what she thought was the consummation of the sale of the Adams Street property, that the defendant informed her at her home that she would have to sign some more papers; that she couldn't read them on account of her eyes and that the defendant told her they pertained to the property at 841 Adams Street and that she signed the papers because she believed him. She further testified that her eyesight is very poor and demonstrated in court her lack of visual acuity. She further testified that she at no time owned any property in Illinois, but that she did get an interest in 30 acres of land by will from her father in 1921; that this interest is a life estate and that upon her death it passes to her two half-sisters, Beatrice and Dorcas Garvin; that she never offered or discussed this property because she knew she never owned it; that she never read any papers which she signed for this defendant during any of her transactions with him because of her eyesight and because of the fact that he read or explained all the papers to her. Plaintiff testified that the first time she knew that this defendant had a deed to her farm in Illinois was in May or June of 1956 when the above-mentioned half-sisters wrote from Illinois and asked her why she sold something that did not belong to her, and that to this date she never to her knowledge signed the receipt, Plaintiff's Exhibit M, for $6,000.00 because she did not receive this money, nor did she sign the deed to the property, Plaintiff's Exhibit L, and, further, that she has no idea what the farm is worth, nor does she have any knowledge of land values whatsoever; that, in fact, the last time she saw the farm was approximately ten years ago.

Various character-witnesses were called in behalf of the plaintiff to testify as to her general reputation in the community, which testimony indicates that the reputation of plaintiff is above reproach. Also, a witness was called to verify the fact that plaintiff suffers from extremely poor eyesight and, in fact, most of the time is able to read only

newspaper headlines with the aid of her glasses and a magnifying glass.

It becomes at once apparent that the testimony of the parties in this case is in direct conflict, and that in order to resolve the issues herein the Court must look carefully to all the circumstances surrounding these transactions, giving due regard to the status and abilities of this plaintiff and this defendant.

Simply stated, we have before the court a case of a licensed real estate broker and a licensed attorney who has been engaged in his pursuits for a great many years and it is clear that he is competent and has had more than a fair amount of success in his chosen professions. The plaintiff, on the other hand, is an aged woman, practically blind, and, from all this Court can gather, possesses no great amount of experience in business matters. But there are certain aspects of the case which, in the opinion of this Court, shed light on what actually happened between these parties during the spring of 1956 and which can lead the Court to only one conclusion.

First, let us consider in retrospect the actions of the plaintiff. Plaintiff's Exhibit SS is a lettter written by the plaintiff on May 10th, to her half-sisters in Illinois, wherein she discusses in detail her activities, and very important in the consideration of this case, states that on the Tuesday before she wrote this letter, which would be May 8, 1956, the date that plaintiff was said to be in the defendant's office consummating this transaction, she had entertained several friends that day and in the evening. When it is considered that for years the plaintiff had written her half-sisters twice a week regularly, this Court cannot say that Plaintiff's Exhibit SS could in any manner be contrived as evidence for this case. On the contrary, the letter is certainly some evidence to show that on the date the plaintiff was supposed to be in defendant's office she was in fact at her home.

There was also testimony to the effect that for years the plaintiff has used taxicabs in order to travel about the City and that she always used only one Cab Company and gave its telephone number from memory, stating that was the only number she knew to get a cab and that she never traveled by any other mode of transportation. Plaintiff's Exhibit GGG, which is a record of the Cab Company in question, shows that on May 8, 1956, there is no record of any trip from the plaintiff's home to the defendant's real estate office.

An expert witness on questioned documents and handwriting testified that the receipt, wherein it is stated plaintiff received $6,000.00, was typed on two different occasions. The testimony, which was not contradicted in any way shows that the body of the receipt and the word "witness" on the receipt, which is below plaintiff's signature, was typed on one occasion, but that plaintiff's signature line, which appears between the body of the receipt and the witness' signature line, was typed on a different occasion. This evidence then, of course, means, in view of the defendant's original testimony, that the receipt was typed at one sitting, that either the receipt was typed up at one time and the seller's signature line then typed in, or that the seller's signature line was first typed in and then the body of the receipt and the witness' line for signature was later added.

In addition, this receipt shows that plaintiff's address on May 3, 1956 as being 841 Adams Street, when in fact the plaintiff on that date had already moved from the Adams Street residence and lived at 32 Washington Street in Denver.

The notary testified that on May 8th an old lady appeared before her and signed a deed. The Court considers it significant, however, that no positive identification was made, and also that the testimony shows that the notary, shortly after this alleged transaction, stated she had no knowledge of it whatsoever and that very probably she would have

notaried the deed had the person who signed it not been present. However, a year later this witness is quite positive and dogmatic in her assertion that such were not the circumstances. It is always a source of wonder to a court how witnesses may know nothing of a case, or facts surrounding a case, immediately after its transaction, but can appear in court, over a year later, and recall all the details vividly.

Credence is also lent to the plaintiff's statement of the facts as shown by her check of June 4, 1956, to one A. G. Kates, who was identified by all parties as the tenant on the Illinois farm. It would hardly seem likely that the plaintiff would send a check in June to the tenant to cover expenses of purchasing seed for crops to be planted if she had known of the sale a month previous.

On the other hand let us consider the circumstances surrounding defendant's actions during this transaction.

Defendant testifies that he kept large sums of cash in his bathroom closet and that he often uses cash to transact real estate business, that is to purchase properties. The Court must ask itself, is it reasonable to suppose that an educated man and attorney at law and a licensed real estate broker would conduct his business using, as the defendant himself claims, cash from a secreted source. It is hard to imagine that in our present day society with complicated legal problems that arise even in the ordinary course of business, and with our difficult, complicated tax structure, that a business man would be so foolhardy as to conduct buying transactions with an untraceable source of money. But even beyond this, we have the later testimony of the defendant that he testified in the United States District Court in Denver a short time before this transaction arose that he had no assets whatsoever, cash or otherwise. The defendant attempts to explain this by stating that he transfers all assets to his wife, and yet the defendant is either making a misstatement of the facts in the Federal District Court, because it is obvious on its face that he cannot have assets for one purpose and no assets for another purpose.

In addition to the cash which the defendant states he kept in the bathroom closet, he testified that he has at least two checking accounts which apparently he uses in conducting some of his business transactions. This shows that the defendant, of course, does not ordinarily conduct his business affairs through some quirk of personal desire but that he normally uses the accepted banking methods which are in common business practice today.

It is significant also that when defendant first testified, his testimony was clear and unequivocal that Plaintiff's Exhibit M, the receipt, was typed all at one sitting by him in the presence of the plaintiff, and that after hearing the testimony of the expert showing this was impossible, defendant then testified that he took the receipt out of the machine not only once but several times to show it to the plaintiff. Yet, according to the testimony of the expert witness, this receipt was typed at only two sittings. Had it been removed several times, as later stated by the defendant, this would have been equally apparent on the face of the receipt. But such is not the case.

From the foregoing it becomes readily apparent that if any fraud is to be found here on the part of this defendant it must be so found on the basis of all the circumstances surrounding this transaction. However, this is not contrary to law in this state as pointed out in the case of *Dittbrenner* v. *Myerson, et al.*, 114 Colo. 448, 167 Pac. 2d 15, wherein the Colorado Supreme Court said:

> "Fraud may be presumed from the circumstances and condition of the parties . . . to prevent taking surreptitious advantage of the weakness or necessity of another. . . . The essential condition precedent to the applicability of this doctrine is an unequality between the parties; there must be weakness on the one side and advantage taken of that weakness on the other, and 'It must appear that the dominant party either brought about the uneveness in the conditions, or, finding it ready to his hand, utilized and traded on it to extract from the servient party a gift or contract

which he would not otherwise have made.' * * * Where such a relation subsists between two persons, 'The law presumes in favour of the servient party, against the dominant party * *.' 'When the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.' * * * 'The principle on which a court of equity acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation is shown to exist, (although in the case at bar a fiduciary relation did in fact exist because of this defendant acting as the agent of the plaintiff) but extends to all the varieties of relations in which dominion may be exercised by one over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed.' "

Again the case of *House* v. *Smith, Administrator,* 117 Colo. 305, our Supreme Court states that while the rule requiring the burden of proof in establishing fraud is upon him who asserts it does exist, this rule "must be construed in conjunction with the other rule, that fraud in some situations, may be presumed from the relationship, or from the circumstances and condition of the parties contracting, to prevent one taking surreptitious advantage of the weakness of another."

Also, in the above case the Supreme Court pointed out that although the defendant testified that the transaction was entirely regular and that the other party was entirely competent, the trial court was not bound by such testimony, holding in effect that the trial court must consider all the circumstances surrounding these cases.

In addition, the Supreme Court of Colorado has ruled in the case of *Huber* v. *Boyle*, 98 Colo. 360, 56 Pac. 2d, 1333, that in establishing fraud "it is sufficient if there are established by positive and affirmative proof facts and circumstances from which fraud reasonably may be inferred."

Applying the law, then, as set forth by the Supreme Court of Colorado to the case at bar, the testimony shows that the defendant is an educated, trained attorney at law and business man; that the plaintiff is an aged, enfeebled and partially blind woman; that the defendant conducted certain legitimate business transactions for the plaintiff and that the defendant is now in possession of a deed to certain other property belonging to the plaintiff. How the defendant got the deed is entirely unknown to the plaintiff and the defendant's explanation on the manner in which he conducted this transfer of the property is incredible in the eyes of this Court. It is unbelievable that a trained, astute business man and lawyer would make a purchase in untraceable cash while occupying a fiduciary relationship with no usual business records whatsoever being kept, with all supposed correspondence with real estate brokers in Illinois destroyed by the defendant, with the defendant literally bragging in this Court regarding his financial status, while in another court he is in fact broke and has no financial status; the fact that the expert testimony is uncontradicted that the receipt in question was not prepared as originally testified to by defendant.

All these facts can lead the Court only to the conclusion that the defendant at the time he handled the sale of the Adams Street property for this plaintiff, knowing the plaintiff could not see, inserted a blank deed which the plaintiff unknowingly signed, and inserted a blank piece of paper which was later typed up as a receipt, which the plaintiff also unknowingly signed, and then recorded the deed in the State of Illinois in attempting to gain control of plaintiff's property.

This Court is not unmindful of the fact that such a finding against the defendant may have disastrous results on the defendant's continuing to be licensed to practice law and continuing to be licensed as a real estate broker. However, after considering and weighing the testimony care-

fully, and observing the demeanor of the witnesses in the court room, the Court can reach no other conclusion. For the Court to do otherwise it would be necessary to stretch the imagination to the breaking point and to permit a course of conduct which in the opinion of this Court, is extremely reprehensible for any person to pursue, and for an attorney at law it is intolerable. The defendant has cast a reflection not only upon himself as an attorney, but has cast a suspicion on the Bar of this community in general. It is the opinion of the Court that the law is a high and honorable calling, wherein the attorney usually occupies a position of extreme trust and confidence, and that this Court cannot permit such trust and confidence to be violated. It is hoped that the actions of this defendant will not be imputed to the lawyers of this community as a group and that they will not receive censure in the minds and eyes of the citizens in the community for something over which they have no control.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED:

That the defendant herein execute forthwith a quitclaim deed to the said Illinois property in favor of the plaintiff;

That the defendant pay the plaintiff's costs expended herein;

That defendant's counterclaim is hereby dismissed.

The motion for a new trial is dispensed with and it is ordered that the parties are granted 60 days in which to file a designation of record.

DONE in open court this 9th day of May, A. D. 1957.

BY THE COURT:

H. J. RAWLINSON, JR.
Judge

APPENDIX C

Pages 174-177 of the Record Below (The Official Court Reporter's Transcript of the argument between Court and Counsel concerning the joinder of additional parties to the suit.)

"Mr. Howard: At this time I would like to call the attention of the court, because it is material to Mrs. Howard, that she should be present in court when I present this. After they (respondent) filed their complaint they noticed the attorney for the defendant and cross-complainant into court that notice to hear the motion to join additional parties defendant on the basis of a voluntary declaration of trust by the cross-complainant for the benefit of Gladys Iola Howard, his wife, and his minor son, Timothy Gordon Howard, who is five years of age. I feel since they are asking rescission, there should be a complete determination of this matter in this court and that this voluntary declaration of trust should be submitted to the Court.

The Court: You will have to put it in evidence in the proper manner. We will keep the matter in order.

Mr. McClearn (attorney for the respondent): Mr. Howard, if I might direct a request to you—Since you have brought up the matter of your wife's interest, wouldn't it simplify matters if we made a motion to have her joined as a party to this action?

Mr. Howard: May I direct my remarks to the court? I gave considerable thought to this. I was represented by other counsel. My hands were tied for some time because I had other counsel on the case. For personal reasons, I had that counsel withdraw. I thought I would rather handle my own case. But I have given considerable thought to this and I cannot understand why a motion was made to join these parties and then dropped. And yet it seems to me it is a matter that in order for a complete determination to be had, it should be brought to the attention of the court

and that it should be submitted to the court for the court's advice rather than by stipulation between counsel.

The Court: If the motion is withdrawn, then I cannot rule on the motion.

Mr. McClearn: May I suggest a solution? I think Mrs. Howard would be a proper party plaintiff on the counterclaim and a proper party defendant on the plaintiff's case.

(Discussion off the record)

The Court: If Mrs. Howard is a necessary party——

Mr. Howard: They voluntarily withdrew their motion.

The Court: If she is a necessary party to decide these issues she should be joined, and then you will have to have your pleadings on that.

Mr. McClearn: If this matter cannot be done by stipulation, then I prefer to proceed on the pleadings as made.

Mr. Howard: What will happen to the conveyance in trust?

The Court: I do not know.

Mr. Howard: I will make a motion, then, that this wife and minor child be allowed to intervene in this suit.

Mr. McClearn: Again, I would have no objection if the present pleadings could stand and if we could go ahead and try the case today, but I do not care to delay it.

The Court: Can you do it, then on these pleadings?

Mr. Howard: That is why I put it up to the court. If your Honor feels we can do this, we will do so.

The Court: If that motion is granted, we would have to put off the trial.

Mr. McClearn: I would prefer to proceed on the present pleadings.

The Court: Let's go ahead, because you can bring that in anyway. I do not want to put it off now.

Mr. Howard: I do not either, your Honor. But the thing is we are expecting the defendant and cross-complainant to win this suit; and if we do, then this wife and minor

child will have a cause of action that would have to be determined in any event.

(Discussion off the Record)

Mr. McClearn: If I might say so, they are not necessary parties to this case.

Mr. Howard: I would say to your Honor that in checking the law on trusts I find authority to the extent that where a frust is involved it must be determined and the law applied, either the law of the forum or the jurisdiction where it is, because under a conveyance in trust it is as much a conveyance as any other and the parties just cannot be ignored.

The Court: The rules provide that persons wishing to intervene Rule 24c

> 'A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.'

I do not think you can make an oral application to intervene under the Rules, because it has to be in writing. I do not think under the Rules we can consider it now. I think we had better go on."

Plaintiff's (Respondent) Exhibit "O", R 501

VOLUNTARY DECLARATION OF TRUST

KNOW ALL MEN BY THESE PRESENTS, THAT I, H. Gordon Howard,

of the City and County of Denver and State of Colorado do hereby state and declare that I hold the following described property as trustee, subject to revocation of this within declaration of trust at any time during my lifetime at the sole, and exclusive will and pleasure of myself and my wife, Gladys Lola Howard; and I hold said property IN TRUST FOR MY WIFE, GLADYS DELA HOWARD, AND MY MINOR SON, TIMOTHY GORDON HOWARD, and for any minor child or children that may be hereafter born as issue of myself and my beloved wife, during our marriage, with a right reserved in myself and my wife to revoke this within declaration of trust as to any beneficiaries, whether in esse, or not in esse, at the time of this said declaration of trust, at the sole will and pleasure of myself and Gladys Lola Howard, my wife at any time during our lifetimes, and this said declaration of trust is founded upon love and affection for said beneficiaries mentioned herein, with a desire to support and protect each and any of them, and said trust shall automatically terminate upon the death of H. Gordon Howard, after which the said property shall pass under the will of said H. Gordon Howard then in existence, as to any heirs or devisees, or legatees thereunder entitled; and the property hereinunder held in trust is legally described as: The Thirty (30) acres, more or less, being more particularly described as the West Thirty (30) acres of the North One-half (1/2) of the Southwest One-quarter (1/4) of Section Four (4), Township Thirty One (31), North, Range Five East, situated in the vicinity of Ransom, County of La Salle, State of Illinois, together with any appurtenances, hereditaments, and incidents thereunto associated therewith.

The said property is to remain intact during the period of existence of the said declaration of trust, and the rents, issues, profits, and royalties, and rights issuing therefrom, after payment of necessary taxes and expenses of operation are to be paid over to my wife, Gladys Lola Howard, who is to have sole discretion as to their application, in amount, or the manner of use thereof. PROVIDED HOWEVER, THAT AS TRUSTEE I RESERVE THE RIGHT to manage, superintend, and handle all business affairs and negotiations concerning the said real estate for the protection of and best interests of, any, or all of said beneficiaries, but I waive any right or interest in any rents, issues, profits, royalties, or rights issuing out of said real property in trust, which interests and benefits belong hereunder to said beneficiaries during the existence of this said trust.

IN WITNESS WHEREOF, the said H. Gordon Howard has hereunto set his hand and seal on this 6th day of August A.D. 1946.

Signed: H. Gordon Howard

(Seal)

STATE OF COLORADO
CITY AND COUNTY OF DENVER } ss. Herbert L. Rodewell, Notary Public

I, _____, do hereby certify that H. Gordon Howard, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth. Given under my hand and seal, this 6th day of August A.D. 1946.

Commission Expires [illegible]

NOTARY PUBLIC.

and royalties, and rights issuing therefrom, after payment of necessary taxes and expenses of operation are to be paid over to my wife, Gladys Lola Howard, who is to have sole discretion as to their application, in amount, or the manner of use thereof. PROVIDED HOWEVER, THAT AS TRUSTEE I RESERVE THE RIGHT to manage, superintend, and handle all business affairs and negotiations concerning the said real estate for the protection of and best interests of, my, or all of said beneficiaries, but I waive any right or interest in any rents, issues, profits, royalties, or rights issuing out of said real property in trust, which interests and benefits belong hereunder to said beneficiaries during the existence of this said trust.

IN WITNESS WHEREOF, the said H. Gordon Howard has hereunto set his hand and seal on this 6th day of August D56

Signed: H. Gordon Howard

(Seal)

STATE OF COLORADO
CITY AND COUNTY OF DENVER } ss. Herbert L. Rockwell,

I, , do hereby certify that H. Gordon Howard, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth; Given under my hand and seal, this 6th day of August D56.

NOTARY PUBLIC.

Doc. [illegible]. Filed for record 8th day of August, A. D. 1956 at 10:00 o'clock A. M.

STATE OF ILLINOIS, }
COUNTY OF LA SALLE. } ss.

I, A. O. Mueller, Recorder of Deeds in and for said County, do hereby certify that the within and foregoing is a true and correct photo copy of a certain instrument filed for record in Book 1063 of Records on Page 500.

In Testimony Whereof, I have hereunto set my hand and official seal this 29 day of July A. D. 1959.

A. O. Mueller RECORDER OF DEEDS

APPENDIX E

Filed In The Supreme Court Of The State of Colorado
May 11, 1959
George A. Trout, Clerk

No. 18346

IN THE SUPREME COURT OF THE
STATE OF COLORADO

H. Gordon, *Plaintiff in Error*,

v.

Mary Steinhart, Deceased, by her administrator, the International Trust Company, *Defendant in Error*.

Error to the District Court of the
City and County of Denver
Honorable H. Joe Rawlinson, *Judge*.

Petition for Rehearing of the Case

Comes Now the Plaintiff in Error and petitions the Court for hearing of the above-captioned writ of error in which Mr. Chief Justice Knauss delivered the opinion of the Court on an en banc decision of April 27, 1959, wherein the opinion indicates that Mr. Justice Sutton and Mr. Justice Doyle did not participate.

(A) The following are the points which were overlooked or misapprehended by the Court:

(1) The court violated the Constitutional provision of the United States Constitution contained in the Due Process of Law Clause thereof, 14th Amendment, Section I, when it made a final adjudication between parties to the suit, which involved and affected and thereby determined the property rights of Timothy Gordon Howard, a five year old minor beneficiary under an Illinois trust, and his mother, Gladys Iola Howard, an adult beneficiary under the conveyance of land in trust in the State of Illinois, which said beneficiaries were not before the court to defend their property rights, either by guardian ad litem for the minor child, or by representation through the trustee of the Illinois Trust. Iron Cliffs Co. v. Negaunee Iron Company, 197 U.S. 463, 49 L. Ed. 836, 25 S. Ct. 474. — This point was raised in the Motion to Vacate the Judgment filed in the trial court; and in the brief of the Plaintiff in Error under Ground I of the Argument at pages 19-20, and again under Ground 16 of the Argument, at pages 33 and 34, and was completely overlooked by the Court.

2. The Court overlooked the fact that it never had any jurisdiction over the parties, since no Court can make a direct adjudication affecting the rights of indispensible parties not joined and taking part in the trial to protect their interests, as pointed out in Ground I of the Argument in Plaintiff in Error's Brief, Gregory v. Stetson, 133 U.S. 579, 10 S. Ct. 422, 33 L. Ed. 792; Shields v. Barrow, 58 U.S. 130, 17 Howard 130, 158 L. Ed. 158.

3. The Court overlooked the fact that it had a duty under the Due Process of Law Clause of the U. S. Constitution to protect the rights of the minor beneficiary of the Illinois trust, namely Timothy Gordon Howard of five years of age. Bank of U. S. v. Ritchie, 33 U.S. 128, 8 Peter 128, 8 L. Ed. 890.

4. The Court overlooked or misapprehended the fact that it had no jurisdiction over the subject matter, since the

courts of a State where real estate is located (Illinois) have the exclusive right to appoint a guardian of a non-resident minor to protect the minor's constitutional rights, Clarke v. Clarke, 20 S. Ct. 873, 178 U.S. 186, 44 L. Ed. 1028.

5. The Court overlooked or misapprehended the fact that where a suit divests an infant of an interest in real estate, the title of which is in a trustee for his use, the decree is unconstitutional unless a guardian ad litem has been appointed by the trial court to protect the infant's rights from deprivation without due process of law, or unless the trustee is named as trustee in the suit to protect the infant child's property rights, O'Hara v. MacConnell, 93 U.S. 150, 23 L. Ed. 840.

6. The court overlooked or misapprehended the fact that it did not have any jurisdiction over the subject matter of the suit on the further ground that a proceeding to compel execution or cancellation of a conveyance of realty is a proceeding in rem, not a proceeding in personam, and where trust property consists entirely of land, the action is local and must be brought in the state where the land lies (State of Illinois), Galpin v. Page, 9 Fed. Cases No. 5, 206, 3 Sawy. 93, Oakman v. Small, 118 N.E. 775, 282 Ill. 360; 42 U.S. 241, I Howard 241, II L. Ed. 117, McKenna v. Fisk.

7. The court overlooked or misapprehended the fact that the trustee of the Land Trust in Illinois, who was sued in personam as an individual had conveyed all benefits and interests and profits in the Illinois land from himself to Timothy Gordon Howard, a five year old minor, and Gladys Iola Howard in trust under an equitable deed executed and acknowledged before a notary public on August 6th 1956 and recorded in the office of the recorder of deeds as an equitable conveyance of the land on August 15th 1956 at La Salle County, State of Illinois, in Book 1063, at page 505 of the land records, and that the terms in the body of said equitable conveyance prohibit its revocation by the trustee

without the consent of Gladys Iola Howard, the adult beneficiary of the said trust, which trust matter is entirely within the exclusive jurisdiction of the Illinois courts, Gregory v. Stetson, 133 U.S. 579, 10 S. Ct. 422, 33 L. Ed. 792; McKenna v. Fisk, 42 U.S. 241, 1 Howard 241, II L. Ed. 117; O'Hara v. Mac Connell, 93 U.S. 150, 23 L. Ed. 840. The court further overlooked or misapprehended the additional fact that the said deed in equity, or equitable conveyance in trust was executed, acknowledged and recorded on August 15, 1956, or approximately nine (9) months prior to the date of trial in the within entitled case, and yet the minor and adult beneficiaries of the trust were refused the right to protection of their property rights in the trust property contrary to the Due Process Clause of the U.S. Constitution, 14th Amendment, Section 1.

8. The court overlooked or misapprehended the fact that the consideration, or money, that paid for the Illinois land belonged to Timothy Gordon Howard, the minor beneficiary of the land trust in Illinois, and to his mother, Gladys Iola Howard, the adult beneficiary of said trust, and the final adjudication of this court deprives said minor child and his mother of not only their real estate in Illinois, but also their money that paid for said land, without due process of law, Iron Cliffs Co. v. Negaunee Iron Company, 197 U.S. 463, 49 L. Ed. 836, 25 S. Ct. 474; O'Hara v. Mac Connell, 93 U.S. 150, 23 L. Ed. 840.

Respectfully Submitted,

H. Gordon Howard
Attorney at Law
Plaintiff in Error
2470 So. Ivanhoe Place,
Denver 22, Colorado.

I, George A. Trout, Clerk of the Supreme Court of the State of Colorado, do hereby certify the foregoing attached to be a true copy of the petition for rehearing filed in Case

No. 18346, entitled H. Gordon Howard, Plaintiff in Error, v. Mary Steinhart, Defendant in Error, May 11, 1959.

WITNESS, my hand and the seal of said court, affixed at my office in the City of Denver, this sixth day of August, A.D. 1959.

GEORGE A. TROUT
Clerk of the Supreme Court of
the State of Colorado.

APPENDIX F

(The order denying petitioner's motion for rehearing in the Supreme Court of The State of Colorado as it appears at page 493 of the Record certified to this Court.)

That thereafter and on, to-wit: the eighteenth day of May, A. D. 1959, the following order was made and entered of record, to-wit:

H. GORDON HOWARD, *Plaintiff in Error*

v.

MARY STEINHART, Deceased, by her Administrator, the International Trust Company, *Defendant in Error.*

No. 18346

Error to the District Court of the
City and County of Denver.

The court having considered the motion of plaintiff in error for rehearing in the above cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is, denied.

ILE COPY

Office-Supreme Court, U.S.
FILED
NOV 9 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 474

H. GORDON HOWARD, *Petitioner,*

vs.

THE INTERNATIONAL TRUST COMPANY, Special Administrator of the Estate of Mary Steinhart, Deceased, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN FLEMING KELLY
WILLIAM C. MCCLEARN
PHILIP A. DANIELSON
Counsel for Respondent
520 Equitable Building
Denver 2, Colorado

November, 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 474

H. GORDON HOWARD, *Petitioner,*

vs.

THE INTERNATIONAL TRUST COMPANY, Special Administrator of the Estate of Mary Steinhart, Deceased, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Supreme Court of Colorado is reported in 338 P.2d 689 and is printed in Appendix A of the petition for writ of certiorari. The findings and judgment of the District Court in and for the City and County of Denver are printed in Appendix B of the petition for writ of certiorari.

JURISDICTION

The Supreme Court of Colorado entered its opinion on April 27, 1959 and denied a petition for rehearing on May 18, 1959 (Petitioner's Brief, Appendix F, p.31a). An order extending until October 15, 1959 the time for filing a petition for writ of certiorari was signed by Mr. Justice Brennan on August 13, 1959.

Petitioner seeks to invoke the jurisdiction of this Court under the 14th Amendment to the Constitution of the United States and Title 28 United States Code, Section 1257.

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a writ of certiorari to the Supreme Court of Colorado because of an alleged deprivation of due process of law under the Constitution of the United States when such federal question was not raised in the pleadings prior to trial, at trial, or in pursuance of a writ of error to the Colorado Supreme Court, but only upon petition for rehearing addressed to said Colorado court.

2. Whether any rights of alleged beneficiaries under a voluntary declaration of trust with respect to certain real property were adjudicated without due process of law in violation of the 14th Amendment to the Constitution of the United States, where such beneficiaries were not parties in this case, and where an oral motion to intervene on behalf of such beneficiaries was made on the day the trial commenced and denied by the trial court for failure to comply with state procedural requirements, and where the judgment of the trial court in an admittedly in personam action merely required the settlor-trustee to execute a quitclaim deed covering the disputed real property in favor of the plaintiff.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies solely upon the provisions of the 14th Amendment to the Constitution of the United States. No

statute, either state or federal, is alleged to be involved in this case (Petitioner's Brief, p. 4).

SUPPLEMENTAL STATEMENT OF THE CASE

The statement of the case contained in the brief of petitioner is substantially correct and is adopted by respondent, with the exception of the following three points:

1. Petitioner's statement of the case conveys an erroneous impression by stating that the trial court "ordered the petitioner to reconvey the Illinois farm land to the respondent." (Petitioner's Brief, p.6) The exact order of the trial court was "that the defendant herein execute forthwith a quitclaim deed to the said Illinois property in favor of the plaintiff." (Petitioner's Brief, Appendix B, p.21a). The significance of the precise wording of the trial court's order will be discussed hereinafter.

2. Petitioner's statement of the case conveys an erroneous impression by inferring that a federal question was raised at an early stage of the proceedings herein (Petitioner's Brief, pp. 5, 6, and 7). The first time that petitioner alleged the existence of a federal question was in his petition for a rehearing before the Supreme Court of Colorado, as will be shown hereinafter.

3. On July 8, 1959 an order was entered in this action by the District Court in and for the City and County of Denver, State of Colorado, substituting The First National Bank of Denver, as Special Administrator of the Estate of Mary Steinhart, deceased, for and in place of The International Trust Company, Special Administrator of the Estate of Mary Steinhart, deceased, as plaintiff herein. Petitioner H. Gordon Howard, appearing pro se, was present in court at the time such order of substitution was entered. Hence the proper party respondent herein is The First National Bank of Denver, as Special Administrator of the Estate of Mary Steinhart, deceased.

REASONS FOR DENYING CERTIORARI

1. *Petitioner failed to allege the existence of a federal question, either verbally or in writing, until the filing of his petition for a rehearing before the Supreme Court of Colorado.*

2. *No federal question is involved in this case.*

ARGUMENT IN SUPPORT OF REASONS FOR DENYING CERTIORARI

Petitioner failed to allege the existence of a federal question, either verbally or in writing, until the filing of his petition for a rehearing before the Supreme Court of Colorado.

The summons and complaint below were served upon petitioner on August 6, 1956; the trial was held commencing May 1, 1957 and the judgment of the trial court against petitioner was entered on May 9, 1957 (Petitioner's Brief, Appendix B, p.21a). On the same day that the summons and complaint were served upon him, petitioner executed the so-called voluntary declaration of trust in favor of his wife and child (Petitioner's Brief, Appendix A, p.4a). It is the rights of the beneficiaries under this instrument which were allegedly violated by both the Denver District Court and the Supreme Court of Colorado and which form the sole basis for the petition for a writ of certiorari.

During the more than eight months between the commencement of this action and the trial, no attempt was made by petitioner, as trustee or otherwise, to bring the alleged interest of the trust beneficiaries to the attention of the trial court. On December 14, 1956 petitioner filed an answer and counterclaim to the complaint in which he sought to rescind the transaction with plaintiff and to recover the consideration allegedly paid plaintiff. In neither his answer nor his counterclaim did petitioner mention the interest of any other person in the controversy (Petitioner's Brief, Appendix A, p.9a).

On the day the trial commenced petitioner made an oral motion to intervene on behalf of his wife and child. The trial court denied the motion because petitioner had failed to comply with Rule 24, Colorado Rules of Civil Procedure, pertaining to intervention (Petitioner's Brief, Appendix C, p.24a). At the time this motion was made and denied petitioner did not make an objection based on the 14th Amendment to the Constitution of the United States, or on any other federal ground, nor did he do so at any other time during the trial.

Following the trial petitioner moved to vacate the judgment against him for lack of jurisdiction. The motion to vacate the judgment may be searched in vain for any reference to the Constitution or statutes of the United States.

On his appeal to the Supreme Court of Colorado petitioner assigned sixteen grounds of error. The specific assignments of error which are said to raise a federal question are set forth in full on page 7 of petitioner's brief. They contain no reference to either the Constitution or the statutes of the United States.

After the Supreme Court of Colorado affirmed the judgment of the trial court, petitioner, in his petition for a rehearing, for the first time alleged the existence of a federal question (Petitioner's Brief, Appendix E). It is axiomatic that a party who would seek relief in this court for a claimed violation by a state court of his rights under the Constitution or statutes of the United States must have raised the federal question at an early stage of the proceedings to afford the state courts an opportunity of passing upon it. *Edelman vs. People of State of California*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387; *People of the State of New York ex rel. Cohn vs. Graves*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666. A party who attempts to urge a federal question for the first time in a petition for rehearing before

a state court is too late. *Radio Station WOW vs. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092; *Rooker vs. Fidelity Trust Co.*, 261 U.S. 114, 43 S.Ct. 288, 6 L.Ed. 556.

No federal question is involved in this case.

The single point upon which the petition for a writ of certiorari is premised is that the courts of Colorado determined the property rights of parties who were not before the court (Petitioner's Brief, p.9). While admitting that this is an in personam action directed against petitioner alone (Petitioner's Brief, p.10), petitioner nevertheless alleges that in some way the rights of the claimed beneficiaries under the trust instrument were adjudicated (Petitioner's Brief, p.10).

Such an argument ignores the fact that the judgment only required petitioner to execute a *quitclaim deed* in favor of plaintiff (Petitioner's Brief, Appendix B, p.21a). It further ignores the fact that plaintiff, who died after the entry of judgment by the trial court, only held a life estate in the property in dispute here, and hence any interest claimed in such property by either petitioner or his wife and child has long since been extinguished.

In any event, the opinion of the Supreme Court of Colorado on this point is dispositive of petitioner's contention. It is as follows:

> "The action being in personam directed only to Howard, and no relief of any kind being asserted or sought against the beneficiaries of the alleged trust or any other persons who might have or claim an interest in the Illinois property, no determination of their rights is or could be had in this action." (Petitioner's Brief, Appendix A, p.9a).

CONCLUSION

No federal question was raised by petitioner until after this controversy had been heard and determined by both the Denver District Court and the Supreme Court of Colorado.

More importantly, no federal question has in fact been presented to either of the Colorado courts or to this court. For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN FLEMING KELLY
WILLIAM C. MCCLEARN
PHILIP A. DANIELSON
Counsel for Respondent
520 Equitable Building
Denver 2, Colorado

November, 1959.